

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7468

Petition of Department of Public Service to impose)	
penalties upon Don Weston Excavating, Inc., re:)	Hearing at
probable Dig Safe Violation involving a Waitsfield-)	Montpelier, Vermont
Fayston Telephone Company, Inc., d/b/a Champlain)	September 23, 2008
Valley Telecom, utility line located in Hinesburg,)	
Vermont, on 8/22/07)	

Order entered: 11/16/2009

PRESENT: Judith M. Kasper, Esq., Hearing Officer

APPEARANCES: Sarah Hofmann, Esq.
Jeanne Elias, Esq.
for Vermont Department of Public Service

Christopher A. Micciche, Esq.
Desautels & Micciche
for Don Weston Excavating, Inc.

I. INTRODUCTION

On January 31, 2008, the Vermont Department of Public Service ("Department") filed a Notice of Probable Violation of Underground Utility Damage Prevention System pursuant to V.P.S.B. Rule 3.807(A) ("Notice"), alleging that on August 22, 2007, Don Weston Excavating, Inc. ("DWE") violated the provisions of 30 V.S.A. § 7006b when it failed to take reasonable precautions and avoid damage to underground facilities when excavating within the Safety Zone (18" on either side of a marked facility). The Notice stated that underground facilities of Champlain Valley Telecom ("CVT") located at the northwest corner of Route 116 and Charlotte Road in Hinesburg, Vermont, were damaged. The Notice requested that the Public Service Board ("Board") require DWE to pay a civil penalty in the amount of Two Hundred Dollars (\$200.00), and attend a Department-sanctioned Dig Safe seminar within one year of the Board's order in this docket.

On February 21, 2008, DWE filed a response objecting to the Notice and requested a hearing.

On September 23, 2008, Hearing Officer Judith Kasper convened a technical hearing in this docket.¹ In attendance were: Sarah Hofmann, Esq., and Jeanne Elias, Esq., representing the Department; Christopher A. Micciche, Esq., representing DWE; witnesses for the Department, Kevin O'Donoghue and G.C. Morris; and witnesses for DWE, Don Weston and Don Wells.

Pursuant to 30 V.S.A. § 8, and based on the evidence before me, I present the following findings of fact and conclusions of law to the Board.

II. FINDINGS

1. On August 22, 2007, DWE damaged a CVT 50-pair and a 200-pair telephone cable at the intersection of Route 116 and Charlotte Road in the Town of Hinesburg, leaving 30 customers without telecommunications service for four hours. Tr. 9/23/08 at 21 (O'Donoghue); exhs. DPS-1, DPS-2, DPS-3.

2. DWE was working for the State of Vermont installing underground utilities for a new traffic signal in Hinesburg at the time of the accident. Tr. 9/23/08 at 47-48 (Weston).

3. A second contractor, Heindel & Noyes, was working in the same work area on a project putting in "monitoring wells throughout the intersection." Tr. 9/23/08 at 48 (Weston).

4. DWE workers relied on markings that they found at the construction site that they assumed had been placed there as a result of DWE notification to Dig Safe. Tr. 9/23/08 at 49-51 (Weston); tr. 9/23/08 at 74-75 (Wells).

5. It is not known who called Dig Safe, or when, to request the markings at this site. Tr. 9/23/08 at 39-41 (O'Donoghue).

6. DWE was digging with power machinery eighteen inches to two feet away from where the markings indicated that the lines were located. Tr. 9/23/08 at 71-73, 80 (Wells).

7. There was no indication in that area that DWE was about to strike the lines. Tr. 9/23/08 at 71, 73, 80 (Wells); tr. 9/23/08 at 45 (Morris); exh. DPS 5.

1. Ms. Kasper is no longer on the Board's staff. I have been appointed as Hearing Officer to replace her, and I have read the record in this proceeding.

III. DISCUSSION

The Department has alleged that DWE violated 30 V.S.A. § 7006b for failing to take reasonable precautions by using power machinery within the Safety Zone (18 inches on either side of a marked facility) and damaging two CVT cables. Section 7006b provides that:

Any person engaged in excavating activities in the approximate location of underground utility facilities marked pursuant to section 7006 of this title shall take reasonable precautions to avoid damage to underground utility facilities, including but not limited to any substantial weakening of the structural or lateral support of such facilities or penetration, severance or destruction of such facilities. When excavation activities involve horizontal or directional boring, the person engaged in excavation activities shall expose underground facilities to verify their location and depth, in a safe manner, at each location where the work will cross a facility and at reasonable intervals when paralleling an underground facility. Powered or mechanized equipment may only be used within the approximate location where the facilities have been verified.

"Approximate location" is defined by 30 V.S.A. § 7001(7) as "a strip of land extending not more than 18 inches on either side of the underground utility facilities."

At the hearing it became apparent that the Department based its allegations of a violation of § 7006b on inaccurate statements made by Mr. Weston to the Department's investigator, Mr. O'Donoghue. While Mr. Weston stated to Mr. O'Donoghue that DWE used power machinery in a Safety Zone, he was referring to a different project, and not the project that is the subject of this investigation.² Mr. Weston testified that he confused a prior incident in which a "dead" line was damaged with this incident.³ This confusion was explained at length at the hearing:

Q. Mr. O'Donoghue, looking at DPS 4 in the paragraph I just read you in terms of what Mr. Micciche alleged his client said happened at the site, what would have been reasonable precautions in that situation, in the situation that Mr. Micciche is describing in DPS 4 about the heavy concrete block?

A. OK. So if you should find a heavy concrete block on top of a facility

Mr. Micciche: I can perhaps save us some time. I was wrong and I did inform Ms. Hofmann that's not what happened at the scene. So talking about it right now is really irrelevant and a waste of time.

2. Tr. 9/23/08 at 18, 19, 22 (O'Donoghue); tr. 9/23/08 at 58-59, 61 (Weston).

3. Tr. 9/23/08 at 53, 58-59 (Weston).

Ms. Hofmann: Well, it does pose a problem. We may actually have to continue. We actually relied on this information in preparing, even though I have to say Mr. O'Donoghue had not heard this story before. So maybe we can continue because he actually investigated the actual incident, but we had been relying on this statement so I was going to – so if everybody can agree that there's no concrete block

Mr. Micciche: Not on this site.

Ms. Hofmann: Okay. What was in your letter is absolutely wrong?

Mr. Micciche: The concrete block is a red herring.⁴

...

Q. Okay. Now let's talk about Mr. – your conversations with Mr. O'Donoghue. Mr. O'Donoghue was quite emphatic that you basically confessed to wrongdoing at this site. Do you recall his testimony?

A. Yes, I do.⁵

...

Q. Well, you're indicating that what you've told Mr. Micciche and you put in that letter just wasn't true, wasn't this incident?

A. Yes.⁶

...

Q. When you say you got confused when you talked to Mr. O'Donoghue, what job was it that they should have used hand digging? This one with the dead line you keep talking about, is that the one with the concrete block?

A. That one, yes.⁷

...

HEARING OFFICER KASPER: What do you remember being told by your work people, and this is not for the truth of the matter folks, but I just want to know what you were told by your work people about what happened with regard to this incident that's the subject of this notice of probable violation.

MR. WESTON: Okay. The one – the one here, you know, there was actually two different episodes out there. One of them was a dead line and that was, you know, and

4. Tr. 9/23/08 at 18-20.

5. Tr. 9/23/08 at 53 (Weston).

6. Tr. 9/23/08 at 57 (Weston).

7. Tr. 9/23/08 at 58-59 (Weston).

actually at the time when we talked with Mr. O'Donoghue that's the one I thought we were talking about. At the time I guess there was another one and they said it was miss marked and, you know, if it was miss marked, you know, we're not at fault for it.⁸

In its testimony the Department explained that it chose to issue its Notice on the single alleged violation under 30 V.S.A. § 7006b for failure to take reasonable precautions by using power machinery within 18 inches of a marked buried facility. The Department made that choice because Mr. Weston had made a statement to its investigators in which he:

. . . agreed that he shouldn't have dug over the marks and there's a statute for that which is the due precautions. So we processed the NOPV with only that violation knowing that our proposed penalty would include training and we would cover all those topics. So I used discretion not to file two separate NOPVs or cite two separate citations.⁹

However, the statement from Mr. Weston upon which the DPS based its Notice concerned a different project. The evidence at the hearing indicates that, with respect to the August 22, 2007, incident that is the subject of this proceeding, the DWE operator dug at least 18 inches from the markings:

Q. So now tell the Hearing officer specifically where you believed the utility lines was and using the DPS 5 second page.

A. --- I could show you, but when we were digging we were a good 18 to two foot away from where these lines were located where this cable had supposed to have been.¹⁰

Thus the evidence does not support the Department's claim that DWE violated 30 V.S.A. § 7006b by operating power machinery within a Safety Zone.

IV. CONCLUSION

Based on the evidence in the record concerning the violation alleged under 30 V.S.A. § 7006b of this docket, I conclude that the Department has not proved, by a preponderance of the evidence, that DWE's excavation activities on August 22, 2007, were unreasonable. Based on the record, the Department's allegation that DWE operated power machinery unreasonably within a Safety Zone is not supported by the facts.

8. Tr. 9/23/08 at 60- 61 (Weston).

9. Tr. 9/23/08 at 42-43 (Morris).

10. Tr. 9/23/08 at 71 (Wells).

Accordingly, I recommend that the Board deny the Department's request for imposition of a Two Hundred Dollar (\$200.00) fine against DWE for violation of 30 V.S.A. § 7006b, and deny its request that DWE be required to attend a Department-sanctioned Dig Safe seminar within one year of the Board's order in this docket.

This Proposal for Decision has been circulated to the parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 15th day of October, 2009.

s/Pam Stonier
Pam Stonier
Hearing Officer

V. BOARD DISCUSSION

We adopt the Hearing Officer's proposed findings, conclusions, and recommendation. The Department's Notice of Alleged Violation was based on incorrect information, which was brought to the Department's attention at the technical hearing. We are puzzled as to why the Department, knowing that its Notice was based on inaccurate information, did not withdraw its Notice or seek a continuance rather than proceed with a hearing and briefs on the faulty Notice.

We expect that should similar circumstances be presented in the future, the Department will take appropriate actions to ensure that the parties' and the Board's time and resources are not spent in unnecessary proceedings.¹¹

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. The findings, conclusions and recommendation of the Hearing Officer are hereby adopted.
2. The Department of Public Service's ("Department") requests that the Public Service Board impose a Two Hundred Dollar (\$200.00) fine for violation of 30 V.S.A § 7006b against Don Weston Excavating, Inc., ("DWE") and that DWE attend a Department-sanctioned Dig Safe seminar within one year of the Board's Order in this docket, are denied.
3. This docket shall be closed.

11. We also expect the Board's hearing officers to take appropriate action if it becomes apparent that a petition is without basis. In this case, however, we find no fault with the Hearing Officer because (1) the full extent of the incorrect information was not evident until near the end of the technical hearing, and (2) it was possible that the Department would amend the NOPV, as permitted under Board Rule 3.807(D), to correspond with the underlying facts.

Dated at Montpelier, Vermont, this 16th day of November, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: November 16, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.